

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

TROY CARPENTER,	)	
	)	
Petitioner,	)	CASE NO. C06-729-TSZ-MJB
	)	
v.	)	
	)	REPORT AND
JEFFREY UTTECHT,	)	RECOMMENDATION
	)	
Respondent.	)	
	)	

I. INTRODUCTION AND SUMMARY CONCLUSION

Petitioner Troy Carpenter is a state prisoner currently incarcerated at the Washington State Penitentiary in Walla Walla, Washington. He proceeds *pro se* in this petition for writ of habeas corpus under 28 U.S.C. § 2254, seeking relief from a sentence of 35 years imposed after his July 2001 conviction in Snohomish County Superior Court. Respondent filed an answer requesting that this Court dismiss petitioner's habeas petition with prejudice on the basis that it is time-barred under 28 U.S.C. § 2244(d). (Dkt. #7.) Having reviewed the record in its entirety, I recommend that Petitioner's habeas petition be dismissed as untimely pursuant to 28 U.S.C. § 2244(d)(1)(A).

II. PROCEDURAL HISTORY

On July 2, 2001, Petitioner was found guilty by plea of first degree robbery with a

REPORT AND RECOMMENDATION

Page - 1

1 deadly weapon (firearm) and third degree assault. (Dkt. #10, Ex. 2.) He was sentenced  
 2 to an exceptional sentence of 420 months of confinement on July 23, 2001. (Dkt. #10,  
 3 Ex. 1.)

4 On December 20, 2001, Petitioner appealed his exceptional sentence to the  
 5 Washington Court of Appeals, Division I (“court of appeals”), claiming that his offender  
 6 score was improperly calculated. (Dkt. #10, Ex. 3.) The Court Commissioner issued a  
 7 ruling on October 2, 2002, granting the court’s motion on the merits and affirming the  
 8 exceptional sentence. (Dkt. #10, Ex. 4.) Thereafter, Petitioner sought discretionary  
 9 review by the Washington Supreme Court (“supreme court”), which denied review  
 10 without comment on September 30, 2003. (Dkt. #10, Ex. 6).

11 On June 22, 2004, Petitioner filed a personal restraint petition (“PRP”) in the  
 12 court of appeals. (Dkt. #10, Ex. 7.) The Acting Chief Judge issued an order dismissing  
 13 the PRP on December 8, 2004. (Dkt. #10, Ex. 8.) Petitioner’s motion for discretionary  
 14 review by the supreme court was denied on October 10, 2005. (Dkt. #10, Ex. 10.)

15 Petitioner filed the present federal habeas petition on May 18, 2006.<sup>1</sup> (Dkt. #1 at  
 16 15.)

### 17 III. GROUND FOR REVIEW

18 Petitioner raises the following four grounds for review in his federal habeas  
 19 petition:

20 GROUND ONE: The exceptional sentence imposed by the trial Court  
 21 violated Petitioner’s 6th Amd. right to have a Jury determine all facts  
 22 which increase punishment. The trial court imposed a sentence of 35

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23 <sup>1</sup>The prison mailbox rule applies. Federal and state habeas petitions are deemed filed when  
 24 the *pro se* prisoner delivers them to prison authorities for forwarding to the Clerk of the Court.  
 25 See *Saffold v. Newland*, 250 F.3d 1262, 1268 (9th Cir. 2001), *overruled on other grounds by*  
 26 *Carey v. Saffold*, 536 U.S. 214, 122 S.Ct. 2134, 153 L.Ed.2d 260 (2002).

1 years. The standard range under Washington law provided for a maximum  
 2 sentence of 292 months or 24 ½ years. The state recommended a sentence  
 3 of 17 years as agreed upon in the plea agreement. The Court imposed a  
 4 sentence of 420 months or 35 years. The Court based the exceptional  
 5 sentence upon it's [sic] finding that Petitioner was a "Rapid Recidivist"  
 6 and also cited to the multiple offense policy of RCW 9.94A. 400. This  
 7 determination was made solely by the trial judge and was not submitted to  
 8 the jury.

9  
 10 GROUND TWO: The State breached the plea agreement violating  
 11 Petitioner's right to due process guaranteed by the 5th and 14th  
 12 Amendments as well as his right to a trial by jury under the 6th Amd.  
 13 During the sentencing hearing the State brought up other uncharged crimes  
 14 that it had agreed to drop as part of the plea agreement. The trial court  
 15 specifically referenced these additional uncharged crimes when it imposed  
 16 the exceptional sentence. (See PRP pages 2-8, Petition for Discretionary  
 17 Review pages 4-7).

18 GROUND THREE: Petitioner was deprived of Effective Assistance of  
 19 Counsel guaranteed by the 6th Amendment to the U.S. Constitution.  
 20 During the sentencing hearing, counsel made several derogatory references  
 21 to Petitioner, described Petitioner as "so institutionalized that he just  
 22 doesn't get it when he gets back out." At no time did counsel advocate for  
 23 Petitioner nor cite to any relevant case law. Counsel made no reference to  
 24 the fact that Petitioner had given up significant rights in agreeing to the  
 25 plea bargain. Counsel closed by stating to the court that Petitioner did not  
 26 deserve a mid-range sentence.

GROUND FOUR: Future dangerousness is not a valid factor for imposing  
 a sentence outside the standard range and results in cruel and unusual  
 punishment. The trial court used Rapid Recidivism as a factor for  
 imposing an exceptional sentence. The court stated that it's [sic]  
 overriding concern was protection of the public. Petitioner outlined in  
 PRP, Reply, and Petition for Discretionary Review that Washington law  
 does not provide for an exceptional sentence based upon future  
 dangerousness. Petitioner further outlined that the U.S. Supreme Court has  
 specifically addressed the recidivism issue in *Apprendi v. New Jersey*.  
 (See Petitioner's Reply App. H.1 pages 15-18)

#### IV. DISCUSSION

Respondent argues that Petitioner's federal habeas petition is untimely under 28  
 U.S.C. § 2244(d)(1) and, therefore should be dismissed with prejudice as time-barred.  
 The undersigned agrees.

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") imposes

REPORT AND RECOMMENDATION

Page - 3

1 a one-year statute of limitations on habeas corpus petitions filed by state prisoners in  
2 federal court. 28 U.S.C. § 2244(d)(1). Specifically, it provides that the one-year  
3 limitations period “shall run from the latest of – (A) the date on which the judgment  
4 became final by conclusion of direct review or by the expiration of time for seeking such  
5 review. 28 U.S.C. § 2244(d)(1)(A).

6 Thus, under the statute, a judgment becomes “final” in one of two ways – either  
7 by the conclusion of direct review by the highest court, including the United States  
8 Supreme Court, to review the judgment, or by expiration of the time to seek such review,  
9 again from the highest court from which such direct review can be sought. *Wixom v.*  
10 *Washington*, 264 F.3d 894, 897 (9th Cir. 2001); *cf. Bowen v. Rowe*, 188 F.3d 1157,  
11 1158-59 (9th Cir. 1999) (“We hold that the period of direct review includes the period  
12 within which a petitioner can file a petition for writ of certiorari from the United States  
13 Supreme Court, whether or not the petitioner actually files such a petition.”).

14 On direct review, the state supreme court denied petitioner’s petition for  
15 discretionary review on September 30, 2003. (Dkt. #10, Ex.6.) Petitioner then had 90  
16 days after entry of that order to file a petition for writ of certiorari in the United States  
17 Supreme Court. Sup. Ct. R. 13(1). Accordingly, because Petitioner could have filed a  
18 petition for writ of certiorari during that time period, his state court judgment became  
19 final and the AEDPA limitations period began to run on December 29, 2003, the date on  
20 which that time period expired.<sup>2</sup> Counting forward one year, Petitioner had until

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21  
22 <sup>2</sup>Petitioner argues that his judgment became final on November 4, 2003, the date the  
23 Court of Appeals mandate was filed. Dkt. #1 at 14. However in *Wixom*, the Ninth Circuit  
24 rejected a similar argument, finding that a mandate is not a decision terminating review. 264 F.3d  
25 at 897-98, quoting Wash. R. App. P. 12.5 (a) (West 1998) (“A ‘mandate’ is the written  
26 notification by the clerk of the appellate court to the trial court and the parties of an appellate  
court decision terminating review.”).

1 December 29, 2004, to file his federal habeas petition, unless the statute of limitations  
2 was statutorily or equitably tolled.

3 Here, Petitioner's federal habeas petition was filed on May 18, 2006, almost  
4 seventeen months outside the limitations period. Therefore, his federal habeas petition is  
5 timely only if his state court PRP tolled AEDPA's statute of limitations for all but 365  
6 days or less between the date on which the limitations period began to run and the filing  
7 of his federal habeas petition.

8 A. Statutory Tolling

9 The AEDPA provides that the one-year statute of limitations is tolled for "[t]he  
10 time during which a properly filed application for State post-conviction or collateral  
11 review with respect to the pertinent judgment or claim is pending." 28 U.S.C. §  
12 2244(d)(2). An application is "properly filed" when its delivery and acceptance are in  
13 compliance with the applicable laws and rules governing filings, including the time  
14 limits upon its delivery. *See Artuz v. Bennett*, 531 U.S. 4, 8, 121 S.Ct. 361, 148 L.Ed.2d  
15 213 (2000).

16 In this case, the AEDPA limitations clock had run for 176 days before it is was  
17 tolled by Petitioner's PRP, which was filed on June 22, 2004. (Dkt. #10, Ex. 7.) The  
18 limitations period remained tolled until October 10, 2005, the date the state supreme  
19 court denied Petitioner's motion for discretionary review. (Dkt #10, Ex. 10). At that  
20 point, Petitioner still had 189 days remaining before the one-year statute of limitations  
21 would expire. However, Petitioner filed his federal habeas petition on May 18, 2006,  
22 which was 220 days after the AEDPA limitations clock resumed running. Thus,  
23 Petitioner's federal habeas petition is untimely because the one-year AEDPA statute of  
24 limitations had expired thirty-one days before it was filed.

1 B. Equitable Tolling

2 The federal habeas corpus statute of limitations is also subject to equitable tolling.  
 3 *Calderon v. United States Dist. Ct. (Beeler)*, 128 F.3d 1283, 1288 (9th Cir. 1997),  
 4 *overruled in part on other grounds by Calderon v. United States Dist. Ct. (Kelly)*, 163  
 5 F.3d 530, 540 (9th Cir. 1998) (en banc). However the Ninth Circuit has made it clear  
 6 that “[e]quitable tolling will not be available in most cases, as extensions of time will  
 7 only be granted if ‘extraordinary circumstances’ beyond a prisoner’s control make it  
 8 impossible to file a petition on time.” *Calderon (Beeler)*, 128 F.3d at 1288 (citing  
 9 *Alvarez-Machain v. United States*. 107 F.3d 696, 701 (9th Cir. 1997)). When external  
 10 forces, rather than a lack of diligence, account for the failure to file a timely claim,  
 11 equitable tolling of the statute of limitations may be appropriate. *See Miles v. Prunty*,  
 12 187 F.3d 1104, 1107 (9th Cir. 1999); *Calderon (Kelly)*, 163 F.3d at 541. In the present  
 13 case, petitioner has made no showing that he is entitled to equitable tolling.

14 Because petitioner filed his federal habeas petition outside the statute of  
 15 limitations, and because he has not demonstrated that he is entitled to equitable tolling of  
 16 the statute of limitations, his petition should be dismissed as time barred.

17 V. CONCLUSION

18 For the reasons set forth above, I recommend that Petitioner’s federal habeas  
 19 petition (Dkt. #1) be DENIED, and that this action be dismissed with prejudice. A  
 20 proposed order accompanies this Report and Recommendation.

21 DATED this 21<sup>st</sup> day of November, 2006.

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23  
 24 MONICA J. BENTON  
 United States Magistrate Judge